United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1551

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1551

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Industry-Drivers and Ice Cream Employees Union Pension Fund, a pension trust fund,

Plaintiffs-Appellees-Appellants,

—against—

KRAFTCO CORPORATION, HERBERT B. ARMEL, EMER C. FLOUNDERS, HARVEY J. FREM, JR., LAWRENCE BAYARD, EDWARD DROZD, LOUIS SCHACHTER and JOHN REISENBERG,

Defendants,

KRAFTCO CORPORATION,

Defendant-Appellant-Appellee.

BRIEF OF PLAINTIFFS-APPELLEES-APPELLANTS

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Preliminary Statement

The decision appealed from was rendered by Circuit Judge J. Edward Lumbard, sitting by designation. Judge Lumbard's opinion and order are reported at 85 LRRM 3030 and are reproduced at pages 218a-246a of the Joint Appendix.

An order has been made by the Clerk granting leave to the plaintiffs to file a brief not in excess of 75 printed pages.

The Issues Presented for Review

1. Is the determination of an appraiser, in the absence of fraud or misconduct, entitled to the same respect as an arbitrator's award?

2. May an agreement which is not ambiguous on its face, and which is not shown to have any latent ambiguity, be altered to conform to the alleged subjective intent of a party?

3. Even if an agreement is ambigous as to the method to be employed by an appraiser, does the appraiser have the same authority as an arbitrator to resolve such ambiguity?

4. Even if an appraiser's determination is not entitled to at least the same respect as an arbitrator's award, is an appraisal made upon remand of the district court which requires the appraiser to conduct the proceeding as if it were an arbitration entitled to such respect?

5. May the determination of an appraiser in the absence of fraud or misconduct be reviewed to correct errors of fact or mistakes in calculation?

Statement of the Case

Defendant's Appeal

The defendant Kraftco Corporation (herein Kraftco) appeals from a judgment entered in the United States District Court for the Southern District of New York on February 22, 1974 upon the opinion and order of Circuit Judge Lumbard dated February 19, 1974. Judge Lumbard granted damages to the plaintiffs in the amount of $576,700.00. Kraftco contends that the amount awarded against it should have been $135,100.00.* Kraftco also appeals from an order of Judge Lumbard dated March 28, 1974 which denied Kraftco's motion for amendment of the judgment or for a new trial.

Plaintiffs' Appeal

The plaintiffs cross-appeal upon the ground that the aforesaid judgment did not award the full amount of damages to which they were entitled. The plaintiffs contend that the amount of the judgment should have been $978,100.00 instead of $576,700.00.**

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* Kraftco states in its brief that its liability should be $134,100 (*see*, page 3). Its position throughout the trial has been that its liability is $135,100 (*see*, 247a). The references in Kraftco's brief to the lower amount are apparently inadvertent errors.

** The docket number assigned upon the docketing of the cross-appeal is 74-1605. The parties have stipulated, pursuant to Rule 28(h) of the Federal Rules of Appellate Procedure, that Kraftco shall be considered the appellant for all purposes. The joint appendix and briefs bear the docket number assigned upon the docketing of Kraftco's appeal.

THE PARTIES

The Plaintiffs

The plaintiffs, Peter F. Clark and Anthony Iorio, sue in a dual capacity (a) as Presidents, respectively, of Ice Cream Drivers and Employees Union Local 757, and of Milk Drivers and Dairy Employees Union Local 680, each affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Unions), and (b) as Trustees of and on behalf of all of the Trustees of Ice Cream Industry-Drivers and Ice Cream Employees Union Pension Fund (herein Ice Cream Industry Pension Fund). The remaining plaintiffs sue on behalf of themselves and other Trustees in their capacity as Trustees of the Ice Cream Industry Pension Fund.

The Defendants

Defendant Kraftco is an employer engaged in an industry affecting commerce within the meaning of Section 301 of the Labor-Management Relations Act, 1947, as amended, 29 USC § 185, and is an employer of employees represented by the Unions. (5a-6a, 12a).

Kraftco prior to April 17, 1969, was known as National Dairy Products Corporation. Sealtest was formerly a trade division of National Dairy Products Corporation and is presently a trade division of Kraftco. (6a, 12a-13a). References to Kraftco herein will include National Dairy Products Corporation and Sealtest Foods Division (herein Sealtest).

No affirmative relief was requested against the defendants other than Kraftco. The original defendants other than Kraftco, namely Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvogel, Louis Schachter and H. Schuy-

ler Todd, were the management-designated Trustees of the Ice Cream Industry Pension Fund at the time this action was commenced. They declined to become plaintiffs in this action and were therefore joined as defendants so that all of the Trustees of the Ice Cream Industry Pension Fund would be before the court. (fn. 1 at 219a).*

Background of Action

The plaintiffs sought judgment to recover from Kraftco the sum of $978,100.00, plus interest from October 21, 1969 (8a). That amount was due from Kraftco to the Ice Cream Industry Pension Fund under a determination made by Martin E. Segal Company, Inc., the Fund's actuarial consultants. The determination was made pursuant to a final and binding agreement entered into by the Unions and Kraftco for an appraisal of the amount owed by Kraftco to the Fund as a result of the closing of an ice cream plant operated by Kraftco in Newark, New Jersey, known as the Breyer Plant.

The appraisal agreement (herein the Breyer Agreement) was entered into by Kraftco and the Unions on or about April 25, 1968. The controlling portion is section 3, which reads as follows:

> "3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the dis-

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* The defendants Harvey J. Frem, Jr., Lawrence Bayard, Edward Drozd and John Reisenberg succeeded the original defendants Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvogel, and H. Schuyler Todd as Trustees upon the resignation of the original defendants. (fn. 1 at 219a). All parties entered a stipulation on May 14, 1974, acknowledging that the defendants other than Kraftco have not appealed and do not intend to file briefs. The names of such other defendants have been omitted from the caption of Kraftco's brief. Inasmuch as they are still parties to the action, they are listed as defendants on the caption of plaintiffs' brief.

continuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties" (303a-304a).

Collective Bargaining History

The Unions and Kraftco had been parties to collective bargaining agreements for more than 20 years (56a-57a). Those agreements customarily had been on a multi-employer, industry-wide basis, including various employers doing business in the States of New York and New Jersey (230a). Local 680 is a New Jersey union and Local 757 is a New York union (56a).

Establishment of Ice Cream Industry Pension Fund

The collective bargaining agreement between the Unions and Kraftco and other employers which became effective May 1, 1951 (plaintiffs' exhibit 1) provided for the establishment of the Ice Cream Industry Pension Fund. Each of the employers covered by that collective bargaining agreement agreed to make an initial contribution of 5¢ per straight time hour to the Fund for each of its covered employees (256a, 295a).

To implement the provisions of the collective bargaining agreement in regard to the establishment of the Ice Cream Industry Pension Fund, the Unions and the employers, including Kraftco, entered into a trust agreement (herein the

Trust Agreement; plaintiffs' exhibit 7) to be administered by an equal number of employer-designated trustees and union-designated trustees pursuant to the requirements of Section 302 of the Labor-Management Relations Act, 29 USC § 186 (223a).

With respect to payments to be made into the Fund by employers, Article VI of the Trust Agreement provided in part as follows:

> "The aforesaid amounts, allocation and the sources of contributions shall be subject to modification or amendment in any manner hereafter agreed upon by the Employers and the Unions and set forth in written collective bargaining agreements" (295a).

Thereafter, as the collective bargaining agreements between the unions and the employers expired, and were renegotiated, the payments to be made by the employers were increased, and the amounts of the increased payments were in each case specified in written collective bargaining agreements.*

1968 Negotiations

The collective bargaining agreement, known as the Ice Cream Industry Area-Wide Agreement, which became effective on May 1, 1965, expired by its terms on April 30, 1968. Negotiations for the renewal of the Ice Cream Industry Area-Wide Agreement took place in April 1968 at the Sheraton Motor Inn in New York City (42a).

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* The Trust Agreement was also amended from time to time. The relevant portion of Article VI § 1 of the Trust Agreement in effect when the Breyer Agreement was made (plaintiffs' exhibit 8) was as follows:

> "Each and every employer shall pay to the trustees the contributions required by his written Collective Bargaining Agreement with the Union." (297a)

It became known to the Unions that Kraftco intended shortly to close down its Sealtest Division ice cream manufacturing plant located at Newark, New Jersey, known as the Breyer Plant (42a, 231a).

The closing of a plant covered by the collective bargaining agreement would necessarily result in diminished employment and therefore diminished employer contributions to the Pension Fund, since contributions were based solely on hours worked by covered employees. The diminution in jobs would also result in earlier retirement for some employees. Thus the Pension Fund would be doubly affected. It would suffer from a reduction of its income as well as from an increase of its expenses (42a).

The Pension Plan was at all times funded by fixed employer contributions expressed in terms of cents per hour worked by employees on the payroll (223a).* These contributions were fixed on the basis of the actuarial predictions of the Fund's actuary. As Judge Lumbard found:

> "A significant departure from these predictions, such as the sudden early withdrawal of a group of employees entitled to benefits and the consequent termination of their employer's contributions, could upset the cost structure of the Fund, either to the extent of making a portion of the unfunded accrued liability a present rather than a contingent deficit, or to the extent of increasing the pro-rata burden on the Fund participants to carry the cost of the unfunded accrued liability" (226a).

Because it was claimed by the Unions that the closing of the Breyer Plant, and the consequent layoff or dismissal of

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* This was found by Judge Lumbard and was not controverted (223a). Judge Tyler erroneously assumed that "assessments" were "levied" upon contributing employers and that they paid "annual interest at the rate of 3% on the accrued liability" pursuant to a specified method of funding (87a).

employees covered by the Ice Cream Industry Area-Wide Agreement, would violate the Agreement (220a), and would also violate the new agreement then being negotiated, and would adversely affect the Ice Cream Industry Pension Fund, and because there was a difference of opinion between the Unions and Kraftco concerning the extent of such adverse impact, the Unions and Kraftco agreed to negotiate a separate agreement to settle their claims and differences with respect to this matter before proceeding further with the negotiation of the Ice Cream Industry Area-Wide Agreement (42a-43a, 220a-221a).

Breyer Agreement

Negotiations for this separate agreement culminated in the Breyer Agreement. The controlling portion has been set forth above.

Kraftco was represented in the negotiation, preparation and execution of the Breyer Agreement by attorney James J. Leyden of the Philadelphia law firm of Schnader, Harrison, Segal & Lewis (70a-71a, 237a-238a). Kraftco was also represented by attorney Aaron L. Solomon of the New York law firm of Solomon, Rosenbaum & Goodman (150a, fn. 5 at 238a-239a, 299a-302a).

On April 25, 1968, when the negotiations were concluded, a preliminary draft of the agreement was handwritten by Mr. Leyden and was signed by him on behalf of Kraftco. It was also signed by Mr. Solomon. The entire text of the handwritten preliminary draft (plaintiffs' exhibit 10, 298a) was as follows:

> "Sealtest—Breyer—Local No. 680 Newark, N.J.
>
> 1. Oral confrontation [sic.; confirmation].
> 2. Sealtest agrees that if the change in Newark-Sealtest operation stated below adversely affects the Ice-Cream Industry Pension Fund, Sealtest

will contribute such sum to the Fund. This actuarial determination will be made with the decision of Martin Segal Co. as final & binding in this regard. Segal & Co.'s study paid for by Sealtest & the fund.

3. Sealtest agrees that each Newark employee permanently severed by the change in operation stated below will receive one week's straight-time pay for each full year of service provided such employee does not quit work before the date the Newark plant closes.

4. On and after November 2, 1968 Sealtest shall have the absolute right to discontinue plant manufacture in Newark, N.J. move to new distributing location in New Jersey from which 680 men will continue to distribute ice cream produced in Sealtest's Long Island Plant.

   The above in (4) must be O.K.ed by industry so that its inclusion in the labor contract will not affect the provisions as to production facilities, etc. appearing in all agreements—in lite of equal treatment clause.

5. Severed Newark employees will be placed at foot of Long Island plant permanent seniority list.

J. J. Leyden for Sealtest
Aaron L. Solomon"

Subsequently the agreement was prepared in final form and typewritten by Kraftco (238a, 299a-302a), and was signed for Sealtest Foods, Division National Dairy Products Corp. (now Kraftco) by V. L. Ashenbrenner, and by Lawrence W. McGinley as President of Local 680, and by Peter F. Clark as President of Local 757. The agreement in its final form, bearing the date of April 25, 1968, was signed by V. L. Ashenbrenner for Kraftco, and transmitted to the

Unions by attorney Aaron Solomon for Kraftco some time in June 1968 (302a). That is the agreement in suit, which has been referred to as the Breyer Agreement (plaintiffs' exhibit 15, 303a-304a). The full text is as follows:

> "MEMORANDUM OF AGREEMENT entered into the 25th day of April, 1968 by and between SEALTEST FOODS, DIVISION NATIONAL DAIRY PRODUCTS CORP. and LOCAL 757, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOCAL 680, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA.
>
> The parties hereto agree as follows:
>
> 1. On and after November 2, 1968 the company shall have the absolute right to discontinue production in its plant located at 444 Raymond Boulevard, Newark, New Jersey and relocate its distribution facilities to a new location in Northern New Jersey from which employees covered by the agreement between the company and Local 680, I.B.T. shall distribute ice cream and ice cream products produced in the company's plant located at 34-09 Queens Boulevard, Long Island City, New York.
>
> 2. The company agrees to pay to each employee whose employment is permanently terminated as a result of the discontinuance of production hereinabove referred to, one (1) week pay at straight time rates as severance pay for each full year of employment with the company provided the employee does not voluntarily quit employment before the date of the discontinuance of production.
>
> 3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the dis-

continuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties.

4. All employees whose employment is terminated as the result of the discontinuance of production at the company's Newark facility shall be placed at the end of the permanent seniority list of the Long Island City plant of the company.

5. During the course of negotiations, the contents of this memorandum of agreement were communicated to the representatives of the employers signatory to the industry area wide collective bargaining settlement agreement with the unions and all parties have agreed that the within memorandum of agreement does not violate the provisions of Section 18 of the industry area wide agreement."

The Consultants' Determination

The consultants to the Pension Fund, Martin E. Segal Company (herein the Segal Company), made their determination, pursuant to section 3 of the Breyer Agreement, on or about October 9, 1969 (plaintiffs' exhibit 16, 305a). They found that there was an adverse effect on the Ice Cream Industry Pension Fund because of the closing of the Breyer Plant in the amount of $978,100.00. The text of the memo-

randum issued by the Segal Company setting forth its determination is as follows:

"From Thomas W. Fitzgerald

To Board of Trustees

Gentlemen:

You will recall that our Company was to be requested to determine the financial impact upon the Pension Fund as a result of the termination of Breyers New Jersey Plant.

We have reviewed all of the records of the company as well as the records of the Fund Office and arrived at the following conclusions:

Total contributions through May 25, 1968		$ 732,400
Benefits paid through January 1, 1969:		
Pensioners:	$ 418,700	
Severance benefits:	20,500	
Total		$ 439,200
Net assets available		293,200
Liabilities as of January 1, 1969		
Pensioners:	$1,035,800	
Active employees eligible to retire:	235,500	
Total		$1,271,300
Deficit		978,100

As you can see a deficit of $978,100 has been incurred as a result of this closing. Should you require any further information, please do not hesitate to contact us."

The Segal Company determination was delivered to the Trustees and to Kraftco in October of 1969.

The memorandum shows that the Segal Company found that the total amount of the contributions paid into the fund by Kraftco through May 25, 1968 on behalf of Breyer Plant employees was $732,400. Against these contributions the Segal Company memorandum shows that Breyer Plant employees had through January 1, 1969 received benefits of $439,200, and that the cost of future benefits to those employees who had already become pensioners, and to the active employees who were then eligible to retire, was $1,271,300. Thus there would be an over-all expense to the Fund of $1,710,500 against contributions of $732,400. The result was that the Fund would ultimately be obliged to pay out $978,100 more than Kraftco had contributed on behalf of Breyer Plant employees and for whom Kraftco would make no further contributions. Therefore Kraftco was required to pay that sum.

Kraftco's Refusal to Pay the Sum Determined

The plaintiffs asked Kraftco to pay the sum of $978,-100.00 as determined by the Segal Company. Kraftco refused. It was the contention of Kraftco that the Segal Company did not use a correct method for determining the adverse effect upon the Ice Cream Industry Pension Fund, and that Kraftco would not regard the determination as final and binding despite the specific provision to that effect in the Breyer Agreement (221a).

Kraftco argued that when the Ice Cream Industry Pension Fund was established all the participating employers agreed to contribute a uniform rate [of 5¢] per straight time hour for each covered employee, a rate thereafter increased by subsequent agreements on a uniform basis for all employers regardless of the cost of any individual plant, and that it was therefore unfair to consider the impact of closing down the Breyer Plant at Newark *ab initio*. Stated

otherwise, Kraftco argued that while, admittedly, they brought into the Fund employees whose age and service created a disproportionately large liability, that imbalance should be disregarded by the consultants in considering the effect of Kraftco's withdrawal of the Breyer Plant from the Fund (114a-115a).

The plaintiffs' contention has at all times been that the Breyer Agreement imposed no limitations with respect to the methods or calculations to be used by the Segal Company. Therefore, in the absence of fraud or misconduct, the Segal Company determination must, as specified in the Agreement, be held final and binding.

Plaintiffs' Motion for Summary Judgment

On or about October 23, 1970, the plaintiffs moved for summary judgment before District Judge Harold R. Tyler, Jr.

In opposing the motion Kraftco did not assert that there had been any fraud or misconduct in regard to the appraisal. The Kraftco defense rested upon the theory that the Segal Company had not used a correct method in arriving at its determination and that the parties to the Breyer Agreement could not have intended that the method in question be used.

Judge Tyler's Opinion

Judge Tyler denied the plaintiffs' motion (323 F. Supp. 358). His opinion dated February 25, 1971 characterized Kraftco's position as follows:

> "The company's challenge may fairly be characterized not as charging fraud or misconduct but gross erorr." (88a)

He concluded that if the Segal determination had been an arbitration proceeding it would have to be confirmed:

> "There is little question but that were the Segal determination the product of an arbitral proceeding, it would be entitled to confirmation." (*Ibid.*)

He regarded the issue before him as follows:

> "The contest turns on (1) the extent to which this court is empowered to scrutinize the actuarial determination, and (2) the intended scope of the Breyer Agreement's submission to the actuary." (*Ibid.*)

Judge Tyler characterized the Segal Company determination as follows:

> ". . . the Segal determination reflects an egregious departure from past funding practice." (94a)

Judge Tyler concluded that there should be a remand to the appraiser and ordered that a new appraisal be conducted "as if it were an arbitration":

> "While that position may prove to be correct, the problem of the proper treatment of the accrued liability factor is too complex to dispose of on the basis of affidavits alone. Rather than substitute the court's judgment for that of the appraisers, I think it singularly appropriate to take advantage here of the latitude offered by N.Y. CPLR § 7601 to remand and enforce this appraisal 'as if it were an arbitration'. Therefore, remand procedure before Segal & Co. shall be attended by the formalities which normally accompany an arbitration proceeding, subject to waiver by stipulation of the parties. This will guarantee an opportunity to the parties to air their respective positions as to the appropriate method of computation." (95a)

The Remand

Judge Tyler's order, dated March 24, 1971 recited that he had made the following findings:

> "1. The contractual language employed in paragraph 3 of the agreement dated April 25, 1968 between the plaintiff Unions and defendant Kraftco regarding the closing of the Breyer-Newark plant (Complaint, Exhibit F; the 'Breyer Agreement') was inadvertently broad and easily susceptible to misunderstanding;
>
> "2. The events surrounding the execution of the Breyer Agreement show that the parties thereto did not intend to confer upon the Segal Company the authority to resolve the ambiguity in the contractual language or to submit to the Segal Company a problem of interpretation which exceeds the traditional scope and expertise of an actuary;
>
> "3. The determination of the Segal Company with respect to impact upon the Pension Fund of the closing of the Breyer-Newark plant (Cohen Affidavit, Exhibit B) reflects a departure from past funding practice and is erroneous in that it disregards the basic decision not to amortize the unfunded accrued liability;" (97a-98a)

Judge Tyler's order concluded by remanding the issue to the Segal Company to make the actuarial determination contemplated by the Breyer Agreement. The order provided that the determination should be made under the following terms and conditions:

> "(1) The determination by the Segal Company shall, subject to waiver by stipulation of the parties, be attended by the formalities which normally accompany an arbitration under Article 75 of the New York Civil Practice Law and Rules;

(2) Prior to the commencement of any proceedings on the remand, the Segal Company shall identify as to date, place, parties and substance, all *ex parte* communications regarding the Breyer Agreement which it or anyone on its behalf may have had with any representative of either of the plaintiff Unions or of defendant Kraftco, or with any other party;

(3) All proceedings before the Segal Company shall be transcribed in full and the Segal Company shall prepare a written report setting forth and explaining, to the extent necessary to facilitate review by the Court, the data and other facts relied upon, the assumptions and analysis employed and the calculations performed;

(4) The determination and report shall be made only by an actuary of the Segal Company and shall be consistent with the funding practice of the Pension Fund prevailing at the time of the closing of the Breyer-Newark plant;

(5) The determination and report of the Segal Company shall be made as construed by the Court's opinion of February 26, 1971 and in this regard consideration may be given to the affidavits and exhibits of record on this motion;" (98a-99a)

Dismissal of Prior Appeal

The plaintiffs appealed to this Court from Judge Tyler's order, and opposed Kraftco's motion to dismiss the appeal, contending that while nominally Judge Tyler's order was an order denying a motion for summary judgment, and on that basis non-appealable, in fact it granted affirmative injunctive relief in that it set aside an appraisal and ordered a hearing and reconsideration by the appraiser. This Court granted Kraftco's motion to dismiss, stating:

"While the Locals' arguments have been presented persuasively they are not sufficient to carry the day. We grant Kraftco's motion to dismiss the appeal for lack of finality under 28 U.S.C. § 1291". (447 F. 2d 933, 936)

The Second Segal Company Determination

In compliance with Judge Tyler's order the Segal Company made a second determination of Kraftco's liability under the Breyer Agreement on or about August 27, 1973.

In accordance with the terms of the remand the matter was set down for hearing, attended by the formalities which normally accompany an arbitration under Article 75 of the New York Civil Practice Law and Rules. The parties appeared before Jack Elkin, an actuary of the Segal Company, on February 1, 1973. The proceedings were transcribed in full by a reporter. The Segal Company prepared and submitted to the Court and to the parties a written report "setting forth and explaining the data and other facts relied upon, the assumptions and analysis employed and the calculations performed." (Redetermination by Actuary, 100a-128a, herein the Report.)

The Report sets forth the "five instructions" of Judge Tyler's Order of March 24, 1971 (102a). As to compliance with those requirements the report states:

"The first three points called for by the Court's Order have been complied with.

"With respect to points (4) and (5), it is noted that the proceeding before the Segal Company was conducted by its Chief Actuary, who made the determination contained in this report. Further, the Actuary finds that his determination is consistent with the funding practice of the pension fund pre-

vailing at the time of the closing of the Breyer-Newark plant and that it is in conformity with the construction placed on the Breyer Agreement by the Court's opinion of February 26, 1971, as the Actuary understands that opinion." (102a-103a)

Confirmation of the Original Determination

With respect to the original appraisal by the Segal Company, namely, the determination made on or about October 9, 1969, which is the subject of this action, the Report states:

> "The Segal Company proceeded with its calculation of 1969 on the basis of its understanding of the Breyer Agreement, with no instructions from the trustees or either of the parties. As the Plaintiff indicated at the proceeding, no effort was ever made by the Defendant to direct Segal in making the calculations. Although the Defendant has now offered its own interpretation of the Agreement, it comes after the fact of the calculation.
>
> "The approach taken by the Segal Company was to reconstruct the history of the Newark plant as a participant in the fund. The total contributions made by the employer with respect to Newark employees was measured against the sum of the benefits already paid and the liabilities for future benefits which the plan had incurred or would incur with respect to these employees. By following the procedure described in the Elkin deposition, the Segal Company found that there was a contribution deficit of $978,100, and this was taken as a measure of the adverse impact of the Newark closing on the pension fund." (113a-114a; footnote omitted)

In summarizing the conclusions reached by the Segal Company in the course of its second determination the Report confirms the reasonableness of the original determination of October 9, 1969 in the following language:

> "1. The Actuary finds that the original Segal calculation represents a reasonable interpretation of the Breyer Agreement. He also acknowledges that it could be interpreted differently so as not to undo all of the advantages that had accrued to Kraftco during the period up to the date of the closing that it had, under the terms of the original trust agreement, been pooling its risks with all other employers. In any event, it is the Actuary's understanding that he is precluded by the action of the Court from making a determination and award based on the original Segal calculation." (123a)

The Result Required by Judge Tyler's Order

While having, in the langage above quoted, confirmed the reasonableness of its first determination, the Report made a further determination as required by Judge Tyler's order. In brief, the requirement imposed by Judge Tyler's order is that the advantage acquired by Kraftco at the time it entered the Ice Cream Industry Pension Fund must be disregarded in appraising the impact of the closing of the Breyer plant (94a-95a). In making a new appraisal which disregarded that element in compliance with the Tyler order, the Segal Company arrived at an amount of $576,-700.00 to be paid by Kraftco.

This method of calculating the impact is referred to in the Report as "the third method of calculation, the alternative suggested by the Defendant" (119a-122a, 123a). The $576,700.00 result is summarized in the Report as follows:

> "3. The actuary finds that the third method of

> calculation, the alternative suggested by the Defendant, is based on a valid interpretation of the Agreement and approaches the problem of measuring the impact most directly. *Bearing in mind the Court's injunction with respect to the original Segal calculation*, the Actuary finds that this third approach to the actuarial study called for in the Agreement is the most appropriate one and herewith recommends that the finding based on that study be accepted by the Court." (123a; emphasis added)

It is compared to the original result of October 9, 1969, as follows:

> ". . . if Kraftco had been an average employer, with the same experience as to turnover, mortality, retirement, etc. as the fund as a whole, the amount determined by the original Segal calculation would have been precisely the amount now determined by the third approach." (122a, footnote)

The Method Proposed by Kraftco

The method preferred by Kraftco and proposed by it is described in Section VII of the Report (116a-119a). Its application would have resulted in a finding that the extent of Kraftco's liability was only $135,100.00. The Report does not find this method to be acceptable. It declares that this method "does not provide a full measurement of the impact" (118a). It finds that:

> "The Defendant's proposal leaves out of account the Breyer employees who had retired before the closing date and were still on the pension rolls. If Breyer had continued to make contributions, part of those contributions would have been available, under the funding scheme in operation, to pay their pensions for the remainder of their lives. If the pro-

> posal is adopted, the cost of the pension benefits still due will have to be absorbed by the remaining contributors to the fund. It will be seen from Appendix 1 that the value, as of the date of closing, of payments still to be made to persons already receiving pensions exceeded $1,000,000." (117a)

It notes that:

> ". . . if the Breyer case were enlarged—that is, if a large number of contributing employers were to terminate and the Defendant's formula applied—the fund would soon be in bankruptcy. . . ." (118a)

At the conclusion of the Report the Kraftco proposed method is summarized as follows:

> "2. The actuary finds that the method proposed by the Defendant is not based on a valid interpretation of the Agreement. This method is too narrow in its scope in that it fails to take into account the pensioner burden left on the fund as a result of the closing, and therefore does not fully measure its impact." (123a)

Appraiser's Compliance With Judge Tyler's Order

As to the validity of the proceedings conducted by the Segal Company pursuant to Judge Tyler's order, Judge Lumbard found:

> "The parties have stipulated, and the court finds, that these redeterminations were made in full compliance with Judge Tyler's order." (222a-223a)

The Decision of Judge Lumbard

The action was tried before Circuit Judge Lumbard sitting without a jury. Judge Lumbard's decision was handed down February 19, 1974 (218a-246a).

The Question of Ambiguity

Admittedly the original determination of the Segal Company was untainted by fraud or misconduct (137a; *see*, footnote 8 at 245a). It would therefore have to be upheld unless it could be shown that the appraiser did not comply with the submission. At the outset of his opinion Judge Lumbard said with respect to Section 3 of the Breyer Agreement:

> "The language seems unambiguous. . ." (221a).

He added:

> ". . . but because of the nature of the Fund, it came to have seriously contested meanings." (*Ibid.*)

At the conclusion of his opinion Judge Lumbard stated:

> "The plaintiffs contended that the agreement was broad but unambiguous and so came under the parol evidence rule. However, at the time the matter was before Judge Tyler, the court held that the critical paragraph 3 of the agreement was ambiguous and that, according to the scope of the authority granted the actuary, any ambiguity concerning the intent of the parties was for the court to resolve. Under the doctrine of the law of the case applicable in this circuit, Judge Tyler's holding should not now be upset unless it is contrary to the 'good sense' of the court. Zdanok v. Glidden Co., 327 F. 2d 944, 952 (2d Cir. 1964)". (229a-230a)

Upon the foregoing reasoning Judge Lumbard made the following determination with respect to ambiguity:

> "Contrary to finding any grounds which might justify setting aside Judge Tyler's prior holding, the court finds, on the basis of the actuary's report of

> August 27, 1973, and on the other evidence at trial relating to the testimony before the actuary, that paragraph 3 of the Breyer Agreement is ambiguous as Judge Tyler held. Consequently the court may consider evidence extraneous to the agreement which may shed light on the parties' understanding of what the language of the agreement meant. 4 Williston, Contracts §§ 613, 614, 627, 629 (3d ed. 1961). The plaintiffs' objection to the admission of this evidence, on which the court had reserved decision, is therefore overruled. (230a)

In his footnote number 3 Judge Lumbard made the following additional comment with respect to the application of the law of the case doctrine:

> "Mr. Elkin, in his report of August 27, 1973, reaffirmed his belief that the original approach reflected a legitimate study under the terms of the Breyer agreement. However, he acknowledged that he understood Judge Tyler's order of March 24, 1971, to preclude his making an award according to this approach. Judge Tyler, in his opinion of February 25, 1971, had stated that 'the [original] Segal determination reflects an egregious departure from past funding practice.' 323 F. Supp., at 363. Thus the defendant urges that the original approach, while actuarially possible, is no longer an option for the court to consider, the court being bound by the law of the case. However, since the court finds that the original approach was not the study intended by the parties, the controlling effect of the law of the case on this point becomes moot." (227a)

At no time during the course of the trial did Kraftco submit evidence with respect to the alleged ambiguity of any specific word contained in the critical portion of the

Breyer Agreement. Nor does the opinion of the trial court point out any specific word or phrase. Kraftco's brief states that it offered ". . . evidence as probative of its *subjective intent* with respect to the type of actuarial study which *it thought* would be pursued in response to the language ultimately used." (Kraftco brief, p. 19; emphasis added; *see*, also, p. 40).

The Breyer Agreement was drafted in its preliminary form by counsel representing Kraftco, namely, James J. Leyden, of the Philadelphia firm of Schnader, Harrison, Segal and Lewis (159a-160a). The final draft was prepared in the offices of Solomon & Rosenbaum also acting as counsel for Kraftco (161a). The final draft was then reviewed and approved by Irving Segal of Schnader, Harrison, Segal & Lewis (161a-162a). Both the preliminary draft and the final draft were accepted by the Unions without any alteration by them or their counsel (238a, 299a-302a).

Extraneous evidence, consisting of negotiators' notes taken during the negotiation of the Ice Cream Industry Area-Wide Agreement was introduced at the trial by Kraftco (Kraftco's exhibits B, C, D, E). These negotiations took place prior to the negotiation of the Breyer Agreement. The Unions unsuccessfully attempted to persuade the entire industry group of employers to accept a proposal known as Union Proposal 34 (Kraftco's exhibit A). In the course of the discussion reference was made to an agreement reached with Swift & Company in 1966 (Kraftco's exhibit J).* The Industry did not agree to Union Proposal 34. Industry-wide negotiations were then suspended while the Unions and Kraftco bargained separately (42a-43a). The result of the separate bargaining was the Breyer Agreement.

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* Kraftco claimed at the trial that the Swift Agreement was intended as the model for the Breyer Agreement.

The plaintiffs objected to the introduction of the extraneous evidence upon the ground that discussions preceding an unambiguous agreement must be deemed merged in the final text (229a). Judge Lumbard overruled the objection (230a).

Union Proposal 34

The substance of Union Proposal 34 (310a), submitted to the industry as a whole, was that when an employer terminated "the employment of employees in sufficient number to affect the pension fund actuarially" he should be obligated to defray the cost of an actuarial study, and should be required to "make such payments . . . to the fund as may be found actuarially required to offset any such effect". It also required the continuance of contributions to the Welfare Fund as well as to the Pension Fund, for certain terminated employees, until the expiration of the agreement.

Union Proposal 34 and the Breyer Agreement were dissimilar. Proposal 34 was not limited in its application to a plant closing. It also applied to an employer who ". . . for any other reason, terminated the employment of employees in sufficient number to affect the pension plan actuarially. . . ." It required continuation of contributions after the termination of employees under certain circumstances. It did not provide who should make the actuarial study, and it did not stipulate that the finding of the actuary should be final and binding.

When asked by one of the Industry negotiators "What effect are we trying to offset?" the Unions' spokesman replied:

> "Any effects determined by the impartial actuary employed by the trustees to the Funds.
> "If you think the clause needs tightening up, then do so by all means . . ." (236a).

The Industry as a whole, including Kraftco, did not accept the Unions' invitation to "tighten up" the clause with respect to the "effect . . . we are trying to offset."

Notwithstanding the emphatic statement that the effects would be "any effects determined by the impartial actuary employed by the trustees to the Funds," Kraftco subsequently drafted and executed the Breyer Agreement without any "tightening up" as to "the effects". On the contrary Kraftco broadened it by specifying that the "consultants to the pension fund shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund" and by stipulating that the "decision of the consultants shall be final and binding." (303a-304a)

The Swift Agreement

Kraftco argued that the trial court should construe the Breyer Agreement so as to conform to the totally separate agreement entered into between the Unions and Swift in 1966 (239a). That agreement involved the closing of a plant which had already taken place in 1965 (240a). The Swift Agreement did not call for any actuarial study. It was not based on any reduction of employees. Swift agreed to offer, and to guarantee, for a minimum period in excess of eight months, reemployment at its Woodbridge, New Jersey, plant for all employees terminated in Brooklyn in 1965 (240a-241a, 325a-326a). In essence the Swift Agreement called for the payment of an amount of contributions estimated to cover the lapse in payments between the time the plant in Brooklyn was closed and the time the Agreement was reached for reemployment of the terminated employees at Woodbridge (240a-241a, 324a).

Kraftco asserted that the Swift Agreement, which had been alluded to in the course of the Industry-wide negotia-

tions, demonstrated that Kraftco's actuarial method, which would have resulted in a payment of $135,100.00, should have been adopted by the actuary (239a).

Judge Lumbard did not reach that conclusion. He held that the allusion to the Swift Agreement showed that the parties intended that the so-called "Alternate Method," which we have previously discussed, should have been adopted. The "Alternate Method" required a payment by Kraftco to the Ice Cream Industry Pension Fund of $576,-700.00. Judge Lumbard stated:

> "Defendant Kraftco has contended that the link of the Breyer agreement to the Swift situation is conclusive that the Kraftco approach was the actuarial study contemplated by the parties. But it is the Segal Company's alternate approach which, in the light of the Swift agreement, emerges as more consistent with the understanding of the parties in April, 1968." (239a-240a)

Judge Lumbard pointed out that it was ". . . Kraftco's own actuarial consultant, Preston C. Basset, in his affidavit of December 10, 1970, who had suggested the alternate approach later used by Mr. Elkin." (footnote 7 at 240a).*

Judge Lumbard found that the three methods or "approaches" which were considered and analyzed by the Segal Company were the "only approaches possible under the agreement" (223a).** He accepted the actuary's terminology, describing these methods as "the original approach"

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* Kraftco's argument with Judge Lumbard as to the genesis of the alternate method (Kraftco brief, pp. 41-43) does not advance the Court's inquiry, especially in view of Mr. Basset's concession as to its reasonableness (210a).

** This was conceded at the trial by Mr. Basset (210a).

(which would result in a payment of $978,100.00), "the Kraftco approach" (which would result in a payment of $135,100.00), and "the alternate approach" which he approved, and upon which the judgment granting damages of $576,700.00 is based. Judge Lumbard granted interest to the plaintiffs on the said sum of $576,700.00 "from November 2, 1968, the date production was terminated at the Newark facility. . . ." (246a)

In approving the "alternate approach" Judge Lumbard reasoned that it was the intent of the parties to "preserve the status quo of the Fund" (243a) and neither to eliminate Kraftco's initial advantage over other employers nor to allow Kraftco to escape responsibility for paying its share of the cost of its previously retired Breyer employees (242a-243a).

Judge Lumbard denied Kraftco's motion to amend the judgment or to grant a new trial which Kraftco argued was required in order to correct errors in calculation (247a-249a). While the denial was not the subject of a separate opinion (249a), it appears to be covered by Judge Lumbard's original opinion which holds that ". . . matters of actuarial expertise are not open to judicial review unless there has been a showing of fraud or personal misconduct. . . ." (footnote 8 at 245a).

Plaintiffs' Contentions

The plaintiffs contend that:

1. The agreement was not ambiguous. It granted unrestricted authority to the appraiser with respect to the formula to be used and the amount to be calculated.

2. Since the agreement was not ambiguous it was error to make a finding with respect to any specific actuarial formula intended by the parties.

3. Under federal law as well as under New York law the Segal Company's determination is entitled to at least the same respect as an arbitrator's award.

4. In the absence of fraud or misconduct the Court may not review the appraisal of the Segal Company.

5. If for any reason the Court holds that the original appraiser's determination must be set aside, the second determination must be sustained.

6. Judge Lumbard properly refused to modify the determination of the actuary.

These contentions will be considered in the order above stated.

ARGUMENT

POINT I

The Agreement was not ambiguous. It granted unrestricted authority to the appraiser with respect to the method to be used and the amount to be calculated.

It would be difficult to conceive how a draftsman could word a broader authorization than that granted to the Segal Company by the Breyer Agreement. Section 3, which is crucial, did not dictate the kind of study to be made or the method of calculation to be used. It left both entirely to the actuary:

> "3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by

the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties." (303a-304a)

No Restrictions Stated

In agreeing that the "consultants to the pension fund shall make an actuarial study of the impact . . ." Kraftco did not specify the type of study or the assumptions on which it should be based. Kraftco was not an inexperienced employer or an unsophisticated bargainer. The Court can take judicial notice that it is one of the world's largest corporations. It had unilaterally consulted its own actuarial adviser in advance of the bargaining (242a), whereas there is no evidence that the Unions had consulted with any actuary. As Judge Lumbard noted, Kraftco's own actuarial adviser had predicted on April 5, 1968 ". . . a liability for pension benefits on closing in an amount close to the Segal Company's alternate approach figure of $576,700." (*Ibid.*) Kraftco had participated with other employers in the ice cream industry in the area-wide negotiations in the course of which the Unions' proposal 34 was discussed (footnote 4 at 233a). It had heard the statement of the Unions' spokesman that the effects they were trying to offset were

> "Any effects determined by the impartial actuary employed by the trustees . . ." (236a).

and the suggestion by the Unions' spokesman

> "If you think the clause needs tightening up, then do so by all means . . ." (*Ibid.*)

It is difficult to conceive how Kraftco could have been better alerted to the broad authority which the Unions asked to repose in the actuary and thus, if Kraftco desired to do so, how Kraftco could have been given a better opportunity to place limitations on the actuary. It is true that the above quoted discussions took place prior to the actual negotiation of the Breyer Agreement, but it is these discussions which Kraftco has asserted justified labeling the Breyer Agreement as ambiguous, and as intended to reflect some sort of reliance on the method exemplified by the Swift Agreement.* Yet it is the fact, as found by Judge Lumbard, that ". . . there is no evidence that the Swift Agreement was ever explicitly discussed in the Breyer negotiations on April 25th" (239a), and it is also the fact that Kraftco never before the trial claimed that the parties had intended the Swift Agreement as the model for the Breyer Agreement. As Judge Lumbard pointed out:

> ". . . when the matter of calculating the 'impact' of the Breyer closing later came before the Segal Company, both in 1969 and again under Judge Tyler's remand, Kraftco failed on both occasions to make any mention of the Swift agreement to the actuary. Nor was the Swift agreement brought to the attention of Judge Tyler." (footnote 7 at 240a)

Judge Lumbard did not find anything inherently ambiguous in the language of the Breyer Agreement. He plainly said:

> "The language seems unambiguous . . ." (221a).

It is true that he finished the sentence by adding

> ". . . but because of the nature of the Fund, it came to have seriously contested meanings." (*Ibid.*)

One is obliged to ask why the "seriously contested meanings" which arose after the event, in the course of the litigation, should be deemed to alter an agreement which the Court found seemingly unambiguous.

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* Judge Lumbard apparently overlooked the critical fact that the area-wide talks failed. Neither Kraftco nor other employers accepted Union Proposal 34. It is therefore fallacious to assume that the discussion of the Swift Agreement, or any other discussion, became a part of the Breyer Agreement. It is more reasonable to assume the opposite.

Final and Binding Authority

Following the unrestricted authorization to the consultants to the Pension Fund to "make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund . . ." Section 3 of the Breyer Agreement continues again without limitation:

> "If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties." (303a-304a)

The parties made it as plain as language permits that they were entrusting the actuary with the determination of impact and the amount to be paid by Kraftco. Any conceivable doubt is removed by the concluding words, "final and binding on the parties", words which are not strange to collective bargaining parties.

Judge Lumbard reviewed the bargaining history *after* finding that the language was seemingly unambiguous. This should not have been done. It would have been appropriate only (a) if the language were on its face ambiguous or (b) if it contained some hidden ambiguity revealed by the bargaining history. But what the bargaining history revealed was no latent ambiguity—*per contra*, it revealed that there was no discussion whatever of any specific actuarial method or limitation, and that the Unions were making it plain that they meant to leave everything to the actuary. In such circumstances a search for the possible intent of the parties is not a resolution of ambiguity. Instead, it is an attempt to guess what the parties would have considered to be the method to be used by the actuary.

It is as if the trial court were saying that it would be legally impossible for the parties to leave the entire question to the actuary, that they must have had some specific method in mind. But neither the record below nor the trial court's opinion reveals any obstacle to a simple finding that instead of speculating as to the proper actuarial method, or as to the probable amount of damages, the Unions and Kraftco mutually agreed that they would rely upon the expertise and the impartiality of the actuary.

It must be concluded that the language of the agreement is not ambiguous on its face, and that the bargaining history does not reveal any latent ambiguity. Accordingly, it must be concluded that it was error to speculate as to what was the probable intent of the parties as to the method to be used by the actuary.*

Kraftco's Own Actuary

Even if it were permissible to speculate as to the actuarial method, or the amount Kraftco would have been required to pay pursuant to any specific method, the original determination of the actuary would be found reasonable.

Kraftco called Preston C. Bassett, actuary and vice-president of Towers, Perrin, Forster and Crosby, Inc. When asked on direct examination about the Segal Company's determination of October 9, 1969 (referred to as the "original determination" or the "original calculation") Mr. Basset declined to characterize it as unreasonable or inappropriate and acknowledged instead that it represented one of the approaches that "would be considered" under the Breyer Agreement:

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* Kraftco's statement at page 30 of its brief that the actuary ". . . conceded that the Breyer Agreement was ambiguous and that actuarial science did not provide the answer to its meaning (114a-115a, 122a)" is incorrect. The actuary stated that various approaches were available under the Breyer Agreement (106a). He found that the "original approach" was reasonable (114a, 123a) and was a method which could be followed under the Breyer Agreement (113a, 123a).

"Q. I said I assumed that the redetermination had three approaches mentioned:

The original determination, the Kraftco approach and the alternate approach.

Do they set in your mind the spectrum of possible alternative interpretations of this language?

"A. I don't know—I can't offhand think of any other original ones. *I think that is reasonable—I wouldn't say the spectrum of figures is but the approaches cover the ones that would be considered, yes.*" (210a; emphasis added)

Mr. Bassett distinguished between the "approaches" utilized by the Segal Company and the "figures" arrived at. As the above-quoted testimony shows, he questioned only the "figures."

Mr. Bassett was questioned further concerning the approaches of the Segal Company and again declined to characterize the determination of October 9, 1969 as unreasonable or inappropriate. He said only that he would be "a little hard-pressed to go the route of the oroginal calculation":

"Q. And among them, can you come back to the Breyer Agreement and focus on the words in the Breyer Agreement that appear to you to be critical, if you were forced to a decision as to which one was intended by the parties?

"A. (After examining) No, not really.

I am a little hard-pressed to go the route of the original calculation. The other two are certainly within the meaning of this paragraph—the alternate and the Kraftco approach." (*Ibid.*)

From the testimony of Kraftco's own actuarial witness it

is clear that the methods utilized in both of the Segal Company determinations are actuarially supportable.

Fairness of Original Determination

What troubled the trial court was that Kraftco's initial advantage was obliterated, and that such a result did not appear to be a necessary consequence of the closing of the Breyer plant (226a-227a). But the actuary's original determination was based on plain and logical arithmetic. It reasoned that when Kraftco closed the Breyer plant it destroyed a fundamental assumption on which the actuarial predictions for the Pension Fund were based, namely, that contributing employers would not withdraw from coverage. When Kraftco shattered this assumption the actuary required Kraftco to reimburse the Fund on a dollar for dollar basis for all costs incurred and to be incurred on account of the Breyer employees. By use of this method neither Kraftco nor the Fund would gain or lose a penny. It was a break-even method.

It is the very fact of the pooled fund that makes the original determination the fairest. When an employer having older employees with many years of service enters such a fund, he saddles it (a) with large obligations for the past service of such employees, and (b) with an additional obligation to make pension payments to such employees at an earlier date than is the case of young employees. Many years of contributions paid during the working lives of new and younger employees are necessary to make up for such a deficit. Premature withdrawal from the fund of such an employer, or such a plant, is the equivalent of a hit-and-run attack. The fund has been charged with the debt and deprived of the income with which to discharge it. In the instant case, as the original determination shows, the Breyer Plant had not remained in the Fund long enough to make

up for its initial advantage and the corresponding disadvantage to the Fund. The deficit was precisely $978,100.00.

The study showed that the total cost of furnishing benefits to the Breyer employees, paid and to be paid in the future, was $1,710,500.00. Total contributions received from Kraftco for Breyer employees was $732,400.00. The difference between the two sums, namely $978,100.00, was the amount necessary to make the Fund whole. Accordingly, the actuary determined that this amount should be paid by Kraftco. There was nothing inherently unreasonable or illogical in the obliteration of Kraftco's initial advantage by the use of this method. The advantage was based on an assumption which Kraftco vitiated; accordingly it was proper to cancel the advantage based on that assumption. We do not argue that this method, "the original approach," was the only appropriate method which the actuary could have used. We argue simply that it was an appropriate method within the ambit of the agreement, and no compelling ground for prohibiting it is disclosed by the record.

POINT II

Since the Agreement was not ambiguous it was error to make a finding with respect to any specific actuarial formula intended by the parties.

In effect what Judge Lumbard attempted to do was to search for the actuarial method which in his belief represented the reasonable expectations of the parties, although such expectations were never articulated by them in the Breyer Agreement or in their antecedent discussions. Such an inquiry might have been appropriate had the Breyer Agreement been ambiguous on its face (patent ambiguity), or had there been proof of facts which established undis-

closed ambiguity (latent ambiguity). Here there was neither.

Kraftco argues that its subjective intent should prevail (Kraftco brief, pp. 19, 40). There is no evidence, however, that such intent was ever stated, or that the Unions acted deceptively.* Kraftco cites only the RESTATEMENT OF CONTRACTS, § 71 as authority for its argument (*Id.* at p. 40). The Restatement reference is inapposite. It is concerned with evidence of offer and acceptance to determine whether a contract has been made. There is no question here that a contract was made or that Kraftco is liable for damages under it. This appeal involves only the amount of damages to be recovered by the plaintiffs.

The Court of Appeals of the State of New York has stated the controlling principle as follows:

> "It is too well settled for citation that, if a written agreement contains no obvious or latent ambiguities, neither parties nor their privies may testify to what the parties meant but failed to state." *Oxford Commercial Corporation* v. *Landau*, 12 N.Y. 2d 362, 365, 239 N.Y.S. 2d 865, 867 (1963)

This principle was subsequently emphasized in the following language:

> "Parol evidence is admissible to resolve an ambiguity, not to create one." *Tramco Industries* v. *Broad Hollow Associates*, 30 A.D. 2d 522, 290 N.Y.S. 2d 260, 261 (1st Dept. 1968), *aff'd*, 23 N.Y. 2d 841, 297 N.Y.S. 2d 739 (1969)

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* The statement at page 19 of Kraftco's brief that Mr. Segal told Mr. Parsonnet the Breyer situation was analogous to the Swift situation and ". . . should be similarly handled (186a)" is not supported by the reference cited or by any other part of the record. Mr. Segal said, ". . . it was worked out in Swift, we will work it out." (187a-188a) There was no discussion of how it would be "worked out."

The principle was reiterated more recently as follows:

> "Nevertheless, it is equally well settled that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face. (Tramco Ind. v. Broad Hollow Assoc., 23 N.Y. 2d 841, 297 N.Y.S. 2d 739, 245 N.E. 2d 408; Rodolitz v. Neptune Paper Prods., 22 N.Y. 2d 383, 292 N.Y.S. 2d 878, 239 N.E. 2d 628; Tobin v. Union News Co., 18 A.D. 2d 243, 239 N.Y.S. 2d 22, affd. 13 N.Y. 2d 1155, 247 N.Y.S. 2d 385, 196 N.E. 2d 735; cf. General Phoenix Corp. v. Cabot, 300 N.Y. 87, 92, 89 N.E. 2d 238, 241; cf. Laskey v. Rubel Corp., 303 N.Y. 69, 71, 100 N.E. 2d 140, 141.)" *Intercontinental Planning* v. *Daystrom*, 24 N.Y. 2d 372, 379, 300 N.Y.S. 2d 817, 822-823 (1969).

There are occasions when courts have difficulty in determining whether the writing before them is final and integrated. But in the case at bar the evidence of integration was overwhelming. As we have seen, Kraftco's lawyer James Leyden, prepared the preliminary handwritten draft of the agreement and submitted it to the Union representatives (159a-160a, 237a). They accepted it as written by him (*Ibid.*). Thereafter the final agreement was prepared and reviewed by various Kraftco lawyers and again accepted by the Unions without alteration (161a-162a, 238a, 299a-302a). It was also submitted to the entire group of ice cream industry employers who acknowledged that it did not violate any of the provisions of the area-wide agreement (footnote 5 at 237a-238a). It specifically stated that it was "final and binding" (304a). It could not be clearer that it was final and integrated.

We are not here arguing for a rigid application of the traditional parol evidence rule. We say that even in its most

liberal application or non-application, there was no extrinsic evidence in this case which justified the imposition of a limitation upon the actuary's good faith judgment. It may be acknowledged that in a number of jurisdictions the parol evidence rule is no longer applied with traditional rigidity.* But in the circumstances of this case to conclude that the agreement should not be altered or attenuated by extrinsic evidence is not to be rigidly traditional. It is merely to apply common sense.

In *Chase Manhattan Bank* v. *First Marion Bank*, 437 F. 2d 1040 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit stated:

> "Thus parol evidence allegedly elucidating intent but contradicting the express terms of a written agreement is never admissible. Chase Manhattan Bank v. May, 3 Cir. 1962, 311 F. 2d 117, 118-119, cert. denied, 1963, 372 U. S. 930, 83 S. Ct. 874, 9 L. Ed. 2d 733; Thomas v. Scutt, *supra*, 27 N. E. at 963. Application of this canon is especially appropriate when, as here, the complaining party has drafted the agreement in question. Rentways, Inc. v. O'Neill Milk & Cream Co., 1955, 308 N.Y. 342, 126 N.E. 2d 271, 273" (437 F.2d at p. 1049 (footnotes omitted)).

Judge Mansfield analyzed the New York law with respect to the parol evidence rule in *Eskimo Pie Corporation* v. *Whitelawn Dairies*, 284 F. Supp. 987 (S.D.N.Y. 1968). He stated:

> "The courts of New York have never subscribed to the view that, in the absence of ambiguity, evidence as to the subjective intent of the parties may be substituted for the plain meaning that would otherwise

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* See 40 ALR 3d 1384 (1971).

be ascribed to the language of a written agreement by a reasonably intelligent person having knowledge of the surrounding circumstances, customs and usages. On the contrary, prior New York law adhered to time-honored objective standards to determine the meaning of language found in writings which represent as did the Package Deal here the final and complete integrated agreement reached by the parties. Oxford Commercial Corp. v. Fred Landau & Co., 12 N.Y. 2d 362, 239 N.Y.S. 2d 865 (1963); Laskey v. Rubel Corp., 303 N.Y. 69, 100 N.E. 2d 140 (1951); Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646, 648 (1928). The cardinal principles forming the cornerstone of those standards are (1) that the meaning to be attributed to the language of such an instrument is that which a reasonably intelligent person acquainted with general usage, custom and the surrounding circumstances would attribute to it; and (2) that in the absence of ambiguity parol evidence will not be admitted to determine the meaning that is to be atttributed to such language. § 2-202 Comment 1(c); Oxford Commercial Corp. v. Landau, 12 N.Y. 2d 362, 239 N.Y.S. 2d 865, 867, 190 N.E.2d 230 (Ct. App. 1963) (Fuld, J.); Arrathoon v. Pergament Oceanside Corp., 53 Misc. 2d 959, 281 N.Y.S. 2d 265 (Sup. Ct. 1965), aff'd., 19 N.Y.2d 923, 281 N.Y.S. 2d 333, 228 N.E. 2d 392 (Ct. App. 1967) (4-to-3); Bayside Federal Savings & Loan Assn. v. Cord Meyer Dev. Co., 28 A.D. 2d 866, 281 N.Y.S. 2d 893 (2d Dept. 1967)." (284 F. Supp. at p. 993)

The Uniform Commercial Code was adopted by New York in 1962, and became effective September 27, 1964. Article 2, which deals with the formation of contracts, applies to "transactions in goods" (§ 2-102). The Code is

mentioned in *Eskimo Pie* but not deemed controlling because it post-dated the agreement in question. Even if it were applied, the Court stated, in reference to various "terms" in the Code permitting the explanation of contract language:

> "None of these terms encompass testimony or other proof as to the subjective intent of the parties" (284 F. Supp. at p. 992).

The Breyer Agreement is obviously not a "transaction in goods" and not within the scope of Article 2 of the Code. Even if it were *Eskimo Pie* shows that the extrinsic evidence involved in the case at bar would not be admissible. The conclusion reached in *Eskimo Pie* is applicable here:

> "Thus the oral statements of the parties as to what they intended unambiguous language in an integrated document to mean are excluded by the parol evidence rule. . . . The effect of admitting such testimony in the absence of some showing of ambiguity would be to permit a party to substitute his view of his obligations for those clearly stated. . . . Accordingly, the view of the New York courts has been that an objective standard is essential to maintain confidence in the written integrated agreement as the medium for conducting commercial relations." (284 F. Supp. at pp. 993-994)

It is clear that the effect of the judgment below is to contradict the express terms of the Breyer Agreement by cancelling the provision that the determination of the Segal Company should be "final and binding."

Before concluding this Point it should be noted that any question as to ambiguity of an agreement should, in case of doubt, be resolved against the party who prepared the agreement, particularly in the case of "lawyer guided ne-

gotiations". *Oxford Commercial Corporation* v. *Landau, supra; Rentways* v. *O'Neil*, 308 N.Y. 342, 348, 126 N.E. 2d 271, 273 (1955); *Gillet* v. *Bank of America*, 160 N.Y. 549, 554-555 (1899); *Leben* v. *Nassau Savings*, 40 A.D. 2d 830, 337 N.Y.S. 2d 310, 312 (2d Dept. 1972).

In *Oxford* Judge Fuld referred to "an integrated agreement reached after lawyer-guided negotiations . . ." (12 N.Y.2d at p. 366, 239 N.Y.S. 2d at p. 867). Here the transaction was not merely "lawyer guided"; in the case of Kraftco it was multi-lawyer guided.

We do not concede that there is any basis for doubt as to the plain meaning of the contract here. We merely point out that if any doubt could be deemed to exist it would have to be resolved against Kraftco.

POINT III

Under Federal law as well as under New York law the Segal Company's determination is entitled to at least the same respect as an arbitrator's award.

Judge Lumbard apparently accepted Judge Tyler's conclusion that an appraiser's award is not, under New York law, entitled to the same respect as an arbitrator's award. He stated:

> "Judge Tyler, in an opinion dated February 25, 1971, held that the determination was not final and binding so far as the construction of the language of the contract was concerned and that, to that extent, a determination by an actuary was not equivalent to an arbitrator's award where resolution of contractual ambiguities would generally be beyond judicial review." (222a)

In that he was in error.

A. Federal Law

The federal courts have held consistently that appraisers' determinations, like arbitration awards, may not be attacked except for fraud or for gross misconduct or mistake amounting to bad faith or dishonesty. *City of Omaha* v. *Omaha Water Company*, 218 U.S. 180, 30 S. Ct. 615 (1910); *Sanitary Farm Dairies, Inc.* v. *Gammel*, 195 F. 2d 106 (8th Cir. 1952); *Aitchison ex ux* v. *Anderson*, 183 F. 2d 922 (9th Cir. 1950); *Luedinghaus Lumber Co. et al.* v. *Luedinghaus et al.*, 299 Fed. 111 (9th Cir. 1924); *Monidah Trust* v. *Arctic Construction Co.*, 264 Fed. 303 (9th Cir. 1920).

In *City of Omaha, supra*, the Supreme Court stated:

> "In the absence of any evidence of actual bad faith, we do not hesitate about agreeing with the circuit court of appeals in the conclusion that there was no such misconduct as to vitiate the valuation." (30 S. Ct. at p. 618.)

In *Sanitary Farm Dairies, supra*, the Court of Appeals for the Eighth Circuit stated:

> "Such an appraisal or evaluation product which the parties have made contractually conclusive upon themselves is therefore, *equally with an arbitration result*, not open to escape by either of them, except where it is capable of impeachment 'for fraud, or such mistake as would imply bad faith, or a failure to exercise honest judgment.' [citations omitted]" (195 F.2d at pp. 113-114; emphasis added.)

In *Aitchison* v. *Anderson, supra*, the Court of Appeals for the Ninth Circuit stated:

> "And in the absence of fraud or mistake the price fixed by a designated third person or persons is con-

clusive upon the parties.[7] An award of appraisers is subject to impeachment for fraud, or misconduct amounting to fraud, or mistake which is not merely a wrong conclusion upon the matters submitted, but it is not to be vacated for mere errors of judgment upon questions of fact or law submitted." (183 F.2d at p. 925.)

Footnote 7 which is incorporated in the above quotation reads as follows:

"1 Williston on Sales, Secs. 167 and 177; Monidah Trust v. Arctic Const. Co., 9 Cir. 264 F. 303, 306; Leudinghaus Lumber Co. v. Leudinghaus, 9 Cir., 299 F. 111; Omaha Water Co. v. City of Omaha, 8 Cir. 162 F. 225, 233. 15 Ann. Cas. 498; Krauss v. Kuechler, 300 Mass. 346, 15 N.E. 2d 207, 117 A.L.R. 1355; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N.E. 432, 27 L.R.A. 271; Martin v. Vansant, 99 Wash. 106, 119, 120, 168 P. 990, Ann. Cas. 1918 D, 1147. See also: Palmer v. Clarke, 106 Mass. 373, 389, where the court said:

'A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive.' "

In *Luedinghaus Lumber Co.* v. *Luedinghaus, supra,* the Court stated:

> "It is true that in cases of appraisal the appraisers are not governed by the rules relating to arbitrators. 'As long as appraisers act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information.' Omaha Water Co. v. City of Omaha, 162 Fed. 225, 89 C. C. A. 205, 15 Ann. Cas. 498. Monidah Trust Co. v. Arctic Const. Co. (C. C. A.) 264 Fed. 303. And the award of appraisers is not to be vacated for mere errors of judgment upon questions of fact. Goddard v. King, 40 Minn. 164, 41 N. W. 659; James v. Schroeder, 61 Mich. 28, 27 N. W. 850. And if the award is within the contemplation of the contract, and contains the honest decision of the appraisers, it will not be set aside." (299 Fed. at pp. 114-115.)

In *Monidah Trust* v. *Arctic Const. Co., supra,* the Court of Appeals for the Ninth Circuit stated:

> "An award of appraisers is subject to impeachment for fraud, or misconduct amounting to fraud, or mistake which is not merely a wrong conclusion upon the matters submitted, but it is not to be vacated for mere errors of judgment upon questions of fact or law submitted. 5 C.J. 179; Goddard v. King, 40 Minn. 164, 41 N. W. 659; James v. Schroeder, 61 Mich. 28, 27 N. W. 850; Duvall v. Sulzner (C. C.) 155 Fed. 910; Palmer v. Clark, 106 Mass. 391; Shawhan v. Baker, 167 Mo. App. 25, 150 S. W. 1096; Donaldson v. Buhlman, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431. In Burchell v. Marsh, 17 How. 344, 15 L. Ed. 96, the court held that, if the award is within the submission and

contains the honest decision of the arbitrators, after full and fair hearing of the parties, a court of equity will not set it aside for error of law or fact, and the court quoted the language of Lord Thurlow in Knox v. Symmonds, 1 Vesey, 369, who said that in order to induce the court to interfere—'there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence.'

"The court went on to say:

'Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality merely because their award is not such an one as the chancellor would have given.'" (264 Fed. at p. 306.)

It is to be noted that in each of the above cited cases the only respect in which appraisals are said not to be governed by the rules relating to arbitrators is that the procedure which the appraiser is entitled to follow is less restricted. He may use any method he wishes to reach a determination so long as it is undertaken in good faith. All of the cases agree that once the appraiser has made his determination it is entitled to the same respect accorded an arbitrator's award, and may not be set aside in the absence of fraud or misconduct.

B. New York Law

If New York law is controlling in this action, the same principles as above stated apply. Under New York law, as enunciated by the Court of Appeals,

> ". . . a dissatisfied party who participated in the selection of an individual appraiser has no greater right to challenge the appraiser's evaluations than he would have to attack an award rendered by an arbitrator." *Dimson* v. *Elghanayan*, 19 N.Y. 2d 316, 325, 280 N.Y.S. 2d 97, 103 (1967).

In *Dimson* the application to stay arbitration squarely raised the question of whether and under what circumstances a party to an appraisal agreement may avoid the appraiser's determination. The Court of Appeals held authoritatively that a party ". . . has no greater right to challenge the appraiser's valuations than he would have to attack an award rendered by an arbitrator."

As shown below, arbitration awards may not be vacated or modified under New York law except for fraud or gross misconduct. The same rule favoring the finality of arbitration awards has been developed by the federal courts for actions arising, as does the present action, under Section 301 of the Labor-Management Relations Act of 1947. *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).*

Judge Tyler recognized that, notwithstanding the alleged ambiguity, if the Segal Company determination had been rendered in arbitration, it would have to be confirmed:

> "The company's challenge may fairly be characterized not as charging fraud or misconduct but gross error. There is little question but that were the Segal determination the product of an arbitral proceeding, it would be entitled to confirmation.

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* *Enterprise* involved compliance with an arbitrator's award in a Section 301 action. 168 F. Supp. 308 (S.D.W.Va. 1958).

> Short of fraud or misconduct, errors of judgment or law are not subject to correction by the courts. *Shevell* v. *Besen*, 29 A.D. 2d 751, 287 N.Y.S. 2d 340 (1st Dept. 1968), *Korein* v. *Rabin*, 29 A.D. 2d 351, 287 N.Y.S. 2d 975 (1st Dept. 1968). Even resolution of ambiguity in the submission is for the arbitrators. *Matter of Colleti*, 23 A.D. 2d 245, 260 N.Y.S. 2d 130, 133 (1st Dept. 1965). Only if the construction adopted by the arbitrators defies all reason will an award be set aside. *Granite Worsted Mills, Inc.* v. *Aaronson Cowen, Ltd.*, 25 N.Y. 2d 451, 306 N.Y.S. 2d 934 (1969), *Matter of National Cash Register*, 8 N.Y. 2d 377, 208 N.Y.S. 2d 951, 955 (1960), *Matter of S & W Fine Foods*, 7 N.Y. 2d 1018, 200 N.Y.S. 2d 59 (1960)." (88a)

Judge Tyler also noted the decision of the New York Court of Appeals in *Dimson* v. *Elghanayan, supra*, but dismissed it as "imprecise dicta," and relied on *In re Delmar Box Co.*, 309 N.Y. 60, 127 N.E. 2d 808 (1955), to support his conclusion that appraisers' determinations are not entitled to the same consideration as arbitration awards (90a-92a).

Delmar Box involved a claim for specific performance of an agreement to have an appraisal made and was not concerned, as is the present case, with enforcement of an appraiser's determination. The issue in *Delmar Box* was stated by the Court of Appeals as follows:

> "Whether the insured under a standard New York fire insurance policy may compel the insurer to comply with the provision for appraisal contained in such a policy, is the question for decision." (309 N.Y. at p. 62)

The action arose under the following circumstances:

> "After the insurance companies, respondents herein, had refused to consent to an appraisal, Delmar initiated this proceeding pursuant to section 1450 of the Civil Practice Act for an order compelling them to comply with the policies' appraisal provisions." (309 N.Y. at p. 63)

The question of the finality to be accorded to an appraiser's determination was not before the Court in *Delmar Box*, no determination having been made, and the Court did not deal with the question. The Court stated that historically agreements to have appraisals made under "the standard provision in a fire insurance policy for appraisal" would not be specifically enforced by the New York courts (309 N.Y. at p. 64), and held that amendments to the Civil Practice Act had not given the insured new statutory rights to specific enforcement. (309 N.Y. at pp. 65-66)

The decision in *Delmar Box* related to an extremely narrow and special area, namely, the right to an appraisal arising under the standard New York fire insurance policy. What Judge Tyler failed to perceive was that under New York law the "standard fire insurance policy" is treated *sui generis*, and that with respect to all other contracts New York emphatically holds that appraisals are to be enforced precisely as arbitrators' awards are enforced.

The Civil Practice Law and Rules ("CPLR") became effective in New York September 1, 1963, and replaced the Civil Practice Act (CPLR §§ 10001, 10005). The CPLR removed whatever effect *Delmar Box* may have had on enforcement of appraisal agreements "other than one contained in the standard fire insurance policy of the state." Section 7601 states in relevant part as follows:

> "A special proceeding may be commenced to specifically enforce an agreement, *other than one contained in the standard fire insurance policy of the state*, that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement *as if it were an arbitration agreement* . . ." (emphasis added)

An agreement to submit matters to appraisal, not involving "the standard fire insurance policy," is enforceable under Section 7601 as if it were an arbitration agreement. Although enforceable "as if it were an arbitration agreement" an agreement for appraisal is not to be transformed into an agreement for arbitration. In *American Silk Mills Corporation* v. *Meinhard-Commercial Corporation*, 35 A.D. 2d 197, 315 N.Y.S. 2d 144 (1st Dept. 1970), the Court held that arbitration could not be substituted for appraisal where the parties had agreed upon appraisal:

> "That section [7601] should be utilized to procure the specific enforcement of the agreement for the fixing of valuation of the inventory of goods and supplies. An arbitration for the purpose of recovering payment for these items is prematurely maintained and *not authorized.*" (315 N.Y.S. 2d at p. 148; emphasis added)

Since *Delmar Box* was not concerned with the question of the finality of an appraiser's determination Judge Tyler's reliance upon it was erroneous. *Delmar Box* does not reflect the law of New York for any appraisal agreement except one contained in a standard fire insurance policy. We turn now to New York decisions concerning the finality of appraisers' determinations.

Cohen v. *Atlas Assurance Company*, 163 App. Div. 381 (1st Dept. 1914),* cited by Judge Tyler (88a-89a), was decided long before the enactment of CPLR Section 7601. It was an action to set aside the determination of appraisers made ". . . in pursuance of the provisions of the standard fire insurance policy . . ." (163 App. Div. at p. 382). Judge Tyler cited *Cohen* as authority for the proposition that, as compared to review of arbitration awards, ". . . review of appraisals is governed by different and broader standards." (88a). He overlooked the limited application of that case to the standard New York fire insurance policy.

Judge Tyler also cited *Gervant* v. *New England Fire Ins. Co.*, 306 N.Y. 393, 118 N.E. 2d 574 (1954), another case which involved the standard New York fire insurance policy. It too was decided before the enactment of CPLR Section 7601. The Court of Appeals in *Gervant* did not, as stated by Judge Tyler, refuse to declare ". . . appraisals and arbitrations subject to the same standards of review". (89a) It was decided on the limited basis that one appaiser on a joint board of appraisers, is ". . . *not free to disregard arbitrarily* pertinent evidence presented by the other appaiser, and that a *flat refusal* . . . to hear such evidence is condemned by authorities in this State as legal misconduct for which the award will be set aside." (306 N.Y. at p. 399;

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* *Cohen* v. *Atlas* and *Application of Hollander, et al.*, 19 A.D. 2d 445, 243 N.Y.S. 2d 979 (1st Dept. 1963), both of which involved the New York standard fire insurance policy, are to the effect that appraisals may be enforced only in a plenary action, and that confirmation may not be obtained under the special proceedings available in New York to obtain confirmation of arbitration awards under Sections 1450, 1458-a and 1459 of the Civil Practice Act (replaced by CPLR Section 7502 (a)). The distinction in New York practice between a plenary action and a special proceeding as the vehicle for confirmation of an appraisal is meaningless in the present case because the Federal Rules of Civil Procedure do not recognize the distinction, and the present action must be deemed plenary.

emphasis in original). Speaking about arbitration proceedings the Court of Appeals stated in the same opinion:

> "Even in arbitration proceedings the rule is that 'If the arbitrators refuse to hear evidence pertinent and material to the matter in controversy, it is unquestionably such misconduct as will vitate an award in a court of equity." (*Id.* at p. 400.)

The special and limited application of the opinion to the standard New York fire insurance policy is plainly shown:

> "The Appellate Division was also correct in concluding, in view of our decision in McAnarney v. Newark Fire Ins. Co. 247 N.Y. 176, 159 N.E. 902, 903, 56 A.L.R. 1149, that the ' "actual cash value" ' of premises *under a standard fire insurance policy in this State* cannot be arrived at by receiving evidence of replacement cost less depreciation only. Rather, the trier of fact should listen to all pertinent evidence on the subject." (*Id.* at p. 398; emphasis added)

Contrary to Judge Tyler's view, the Court of Appeals in *Dimson* v. *Elghanayan, supra,* did not refuse ". . . confirmation of the appraiser's determination explicitly because confirmation lies in the discretion of the trial court," and its holding "equating the rights to challenge appraisals and arbitrations" is not "imprecise dicta" (90a) but the law of New York.

Dimson involved an appraisal agreement supplemental to another agreement which provided for arbitration of disputes. When one party sought arbitration under the main agreement of a matter previously submitted for appraisal under the supplemental agreement, the petitioners

commenced a special proceeding to stay arbitration.* The Appellate Division affirmed Special Term's denial of the application to stay arbitration, and the Court of Appeals reversed.

The Court of Appeals declined to confirm the appraiser's determination because,

> "The original petition does not ask for this relief and, in any event, this is a discretionary *procedure* for the lower court to consider based upon all the factors (CPLR 7601)." (19 N.Y. 2d at p. 325; emphasis added)

The Court of Appeals remanded the case to Special Term for "appropriate relief." (*Ibid.*)

The discretion of the trial court under Section 7601 is in the choice of procedure, whether to permit confirmation in ". . . proceedings . . . conducted as if brought under article seventy-five" or to require a plenary action. This is a far cry from Judge Tyler's statement that confirmation was refused ". . . explicitly because confirmation lies in the discretion of the trial court." (90a) The grounds for confirming or for modifying or vacating an appraiser's determination are the same as for an arbitration award, regardless of the procedure approved by the trial court for confirmation:

> "The presence of the appraisal provision in the supplemental agreement raises a unique problem which makes this case *sui generis*. Section 7601 of the CPLR empowers courts to 'enforce such an [appraisal] agreement as if it were an arbitration

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* Under New York practice, applications to stay arbitration (CPLR § 7503(b)) are brought by special proceeding (CPLR § 7502(a)). *See*, the description of the proceedings in the Appellate Division's opinion. 26 A.D. 2d 442, 275 N.Y.S. 2d 178 (1st Dept. 1966).

agreement' and to treat the proceeding brought to effect its enforcement as one brought under the article (ar. 75) relating to arbitration. In essence, then, the contract before us provides for two instances of arbitration.

* * *

"In our view, the presence of the provision for fixation of values by the appraiser removed that subject from consideration by the arbitrator. In other words, the appraiser's valuations were deemed by the parties to serve in this case the function which an arbitrator's award fixing values would have served in another case. *Under Section 7601 a dissatisfied party who participated in the selection of an independent appraiser has no greater right to challenge the appraiser's valuation than he would have to attack an award rendered by an arbitrator.*" (19 N.Y. 2d at pp. 324-325; emphasis added.)

The suggestion that the above statement is "imprecise dicta" is erroneous. The application to stay arbitration squarely raised the question of whether and under what circumstances a party to an appraisal agreement may avoid the appraiser's determination. The Court of Appeals held authoritatively that a party ". . . has no greater right to challenge the appraiser's valuations than he would have to attack an award rendered by an arbitrator." (19 N.Y. 2d at p. 325)

POINT IV

In the absence of fraud or misconduct the court may not review the appraisal of the Segal Company.

It has been shown that appraisers' determinations are final and binding and are not subject to attack except for fraud or misconduct amounting to dishonesty. The necessary corollary of this conclusion is that an appraiser's determination may not be attacked for errors in selecting methods or in calculations unless it is the result of such fraud or misconduct. The federal courts have so held in appraisal proceedings, and the New York courts have so held in arbitration proceedings.

In *Aitchison et ux.* v. *Anderson, supra,* the plaintiff contended that the appraiser had used an improper method to determine "book value" under the appraisal contract. The Court stated that there was sufficient evidence for the trial court to find that the amount arrived at by the appraiser was not the true book value, but held, nevertheless, that:

> ". . . still there is no evidence at all in the record which suggests bad faith on the part of the accountants. And a dispute over the construction of the contract would not constitute its breach." (183 F. 2d at p. 925)

In *Luedinghaus Lumber Co., et al.* v. *Luedinghaus, et al., supra,* the Court quoted the Court of Appeals' decision in *City of Omaha* v. *Omaha Water Company,** stating that:

> " 'As long as appraisers act honestly and in good faith, they have a wide discretion as to their

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* 162 Fed. 225, affirmed by the Supreme Court at 218 U.S. 180. See, POINT IIIA., *supra.*

> methods of procedure and sources of information.' " (299 Fed. at p. 114)

In *Sanitary Farm Dairies* v. *Gammel, supra*, the Court stated:

> "Within whatever room there existed for reasonable difference in accountancy views or in accountants' opinion and judgment, choice of method and extent of testing, verifying or proving in the auditing task involved was as much a matter which the parties had contracted to entrust to Ernst and Ernst's professional skill, judgment and discretion as any other factor inherent in producing an accounting-appraisal result." (195 F. 2d at p. 115)

It is clear that, absent fraud or misconduct, a party to an appraisal agreement may not attack an appraiser's determination because of his selection of methods of valuation and calculation even if such selection involves resolution of ". . . a dispute over the the construction of the contract . . ." *Aitchison et ux.* v.*Anderson, supra*, at 183 F. 2d p. 925.

The same principle applies to arbitration awards under New York law and therefore to appraisal determinations. In *Colletti* v. *Mesh, et al.*, 23 A.D. 2d 245, 260 N.Y.S. 2d 130 (1st Dept. 1965), *aff'd*, 17 N.Y. 2d 460, 266 N.Y.S. 2d 814 (1965), the Court noted a possible ambiguity in the arbitration demand and the claim of one party that the determination was not the determination called for, and stated:

> "Under such a demand the arbitrators had a broad discretion to resolve the issues before them. Whatever ambiguity there may be in this portion of the demand was for the arbitrators to resolve. An ar-

> bitration award is not reviewable by a court for errors of law or fact." (260 N.Y.S. 2d at p. 133)

The present case does not involve fraud or misconduct and Kraftco may not, as a matter of law, attack the determination of the Segal Company for error in selecting methods of evaluation or computation.

POINT V

If for any reason the court holds that the original appraiser's determination must be set aside, the second determination must be sustained.

It is the position of the plaintiffs that the original determination of $978,100.00 is unassailable. If, however, the Court were to refuse to enforce that determination, Kraftco's appeal must be denied, and Judge Lumbard's enforcement of the second determination must be affirmed.

Judge Tyler directed in his opinion and in his order that the remand be conducted " 'as if it were an arbitration,' " that it be attended by appropriate formalities and that the parties have ". . . an opportunity . . . to air their respective positions as to the appropriate method of computation." (95a, 98a-99a). The parties were given full opportunity during the remand to argue their positions, and Kraftco did so both orally and in its memoranda submitted to the actuary. (*See*, Transcript of Proceedings before Martin E. Segal Co., February 1, 1973; 104a-106a; 115a-119a.) It is conceded that all requirements of Judge Tyler's order were satisfied.

> "The parties have stipulated, and the court finds, that these redeterminations were made in full compliance with Judge Tyler's order." (222a-223a)

The plaintiffs have shown under Point III, *supra*, that the original appraisal is entitled to at least the same respect as an arbitration award. An award in an arbitral proceeding is not subject to review for errors of fact or of law or with respect to ". . . resolution of contractual ambiguities . . ." (222a). The results of such a proceeding may not be set aside except for fraud or misconduct, which are concededly not involved here. Both Judge Tyler and Judge Lumbard recognized this principle (88a, 222a). As shown under Points III and IV, *supra*, it is supported by all relevant state and federal authorities. Kraftco has cited no authorities to the contrary, and there is no basis for departing from the principle here. .

It having been conceded that the second determination was conducted as an arbitration, that all attendant formalities were observed, that Kraftco had full opportunity to present its contentions, and that no fraud or misconduct was involved, Kraftco's appeal must be denied.

Although, for the reasons above stated, the Court may not review such matters, it may be helpful to note that the grounds upon which Kraftco seeks review are without merit.

Both Judge Lumbard (227a, 229a) and Judge Tyler (94a) found the original determination unacceptable because it caused Kraftco to forfeit the cost advantage it obtained by participating in a pooled fund. The "alternate method" preserved Kraftco's cost advantage as a participant in a pooled fund and thereby satisfied Judge Tyler's requirement that it not impose ". . . liability unequally upon Kraftco, particularly in view of Kraftco's continued participation in the Fund through its other plants." (94a). The actuary stated:

> "This approach does not, as does the first, deprive Kraftco of the advantages already accrued to it in the past by virtue of its participation in a pooled-risk fund" (121a-122a).

Judge Lumbard agreed and concluded that this ". . . third approach was the one intended by the parties to the Breyer agreement. . . ." (229a).

Kraftco argues that the actuary erred nevertheless in his treatment of the question of the unfunded accrued liability (Kraftco brief, Argument I) and states that the second determination improperly ". . . effects funding of part of the unfunded accrued liability." (*Id.* at p. 44). Judge Tyler had considered and rejected the categorical contention that ". . . the unfunded accrued liability should play absolutely no part in the determination of 'impact' of the plant closing. . . ." (94a). He left further consideration of the treatement of the unfunded accrued liability to the actuary upon remand (94a-95a).

Thus faced with a decision that the actuary should under the Breyer Agreement resolve the question of the treatment of the unfunded accrued liability, and with a finding that he properly resolved the question and that his resolution conformed to the intent of the Breyer Agreement, Kraftco relies in its brief on the affidavit of its actuarial expert, Preston C. Bassett, to support its contention that the second determination was erroneous (Kraftco brief, p. 41).

The Bassett affidavit was submitted to Judge Tyler in opposition to the plaintiffs' motion for summary judgment. Whatever value it might have had at that time, it was made prior to Judge Tyler's ruling, and prior to the second determination, and is not addressed to either of them. In any event, as has been shown, Mr. Bassett con-

ceded at trial that the second determination's alternate approach was ". . . certainly within the meaning of this paragraph . . ." (210a) *

The remainder of Kraftco's attack on the alternate method involves its contention that Judge Lumbard erred in the manner in which he applied "the precedent of the Swift Agreement." (Kraftco brief, pp. 35 *et seq.*) But the plaintiffs have shown that the Swift Agreement is not a "precedent" and that it may not be considered in construing the Breyer Agreement. (*See*, Points I and II, *supra*).

Swift was discussed only in connection with Union Proposal 34 in the area-wide negotiations. Union Proposal 34 was not accepted by the Industry. New and separate negotiations became necessary, leading to the Breyer Agreement. Not a word of testimony supports the incorporation of Union Proposal 34 or the Swift Agreement into the Breyer Agreement. As Judge Lumbard correctly stated, if Swift were to be given any weight that weight would support the "alternate method" not the "Kraftco approach" (239a-240a). This conclusion is reinforced by the fact that Kraftco never brought the Swift Agreement to the attention of the actuary or of Judge Tyler (footnote 7 at 240a).

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* Kraftco's treatment of Mr. Bassett's trial testimony is interesting. Its brief does not mention the above concession. Instead it quotes at pages 42 and 43 a hypothetical question which assumes that he had been asked to make the type of calculation favored by Kraftco. The brief fails to indicate that the question and answer were separated by several pages of transcript (pages 199-204; see 215a-216a) in which the relevance of the question was argued, and by Judge Lumbard's statement that:

> "Well, I will take the witness' answer for what it may be worth, although at the moment I confess I cannot see the relevance of it." (216a).

POINT VI

Judge Lumbard properly refused to modify the determination of the actuary.

Kraftco argues in Point II of its brief that Judge Lumbard erred in refusing to grant its request for modification of the second determination of the Segal Company. The argument is in two parts: (i) that it was error to direct a lump sum payment; and (ii) that the determination was based on an inaccurate count of the number of employees involved. These contentions are reviewed below.

A. The direction of a lump sum payment was proper and is not subject to review.

Kraftco contends that rather than pay $576,700.00 into the Fund as directed by the actuary and Judge Lumbard, it could satisfy its obligation under the alternate method by paying instead the annual amount of $16,200.00. It equates this amount with interest on $539,300.00 of the $576,700.00 found owing to the Fund. (Kraftco brief, p. 31).

Kraftco argues that because at one time the Fund followed an "interest only" policy with respect to its unfunded liability, Kraftco should not now be required to pay a lump sum. This is a *non-sequitur*. The Fund, at any point in its history, might decide to liquidate or to continue its debt, based upon its current financial condition. Ultimately, however, the debt would have to be paid. In any event, that would not mean that Kraftco should be excused from paying a new debt which it created by closing the Breyer plant. The Fund never committed itself in perpetuity to allow its unfunded debt to remain static. Under Kraftco's argument the Fund would be committed in perpetuity to allow the debt created by Kraftco to remain unpaid.

Kraftco argues that the actuary approved "interest only" payments in the Report and in his deposition (*Ibid*). The statement referred to in the Report is:

> "Second, and in any event, the Segal Company determination of Kraftco's liability [the original determination] did not carry with it the presumption that it necessarily be paid in a lump sum. It could, as far as the Fund is concerned, be treated as a debt with the Fund receiving payments to *liquidate* it over a period of time." (116a; emphasis added)

It should be noted that the word "liquidate" is used. There is no indication that "interest" alone would suffice.

The portion of the deposition referred to and quoted at page 46 of Kraftco's brief is:

> "[151] Q. You calculated a sum to fully fund past service liability in respect of Breyer employees and then made it generally available to the rest of the fund? A. I didn't make it generally available—
>
> Q. I am talking theoretically. In other words, if paid in it would be made available to the rest of the fund? A. Theoretically it would be part of the fund, yes.
>
> It would be fully consistent with an actuary's approach to this if the million dollars were paid in in installments.
>
> The actuary is only concerned with the present value of the deficit in the fund resulting from an employer's termination. The actuary then comes up with a lump sum payment. *If the parties want to have some other arrangement about meeting that obligation, that's not the actuary's concern.*" (27a-28a) (emphasis added).

These statements do not support Kraftco's contention. The parties did not agree to "some other arrangement."

Both statements were made with reference to the original calculation of $978,100. The statement in the Report is found under the discussion of the original calculation (113a-116a). It is not repeated in the discussion of the alternate method which found a liability of $576,700 (119a-122a). The deposition was taken prior to Judge Tyler's remand order and was concerned only with the original determination. It is equally clear that a lump sum payment is the only method of payment consistent with the alternate method. The actuary explained this as follows in the Report:

> "The significance of the determination lies in showing that if $576,700 had been acquired by the Fund *on the closing date*, it would have been in the same actuarial position (as measured by the balance between expected income and expected benefits) as it would have been in if the Breyer plant had not closed, that is, the impact of the closing would have been offset." (121a) (emphasis added).

Whether with reference to the "original approach" or the "alternate approach", it is obvious that a lump sum payment is required. Mr. Elkin made it clear in his deposition that if payment were to be made in installments rather than in a lump sum, the arrangement would have to be agreed to by the parties.

> "The actuary is only concerned with the present value of the deficit in the Fund resulting from an employer's termination. The actuary then comes up with a lump sum payment. *If the parties want to have some other arrangement about meeting that obligation, that's not the actuary's concern.*" (27a-28a; emphasis added).

Mr. Elkin went further and emphasized in the portion of his deposition not quoted by Kraftco that in no event could annual interest payments on Kraftco's liability be considered a substitute for payment of the liability itself.

> "Q. Just to pursue and close one final point. Given the calculation you made of the $978,100 deficit in accrued past service liability, if from the time of the Breyer closing the fund continued in its then present form, the increased cost into the foreseeable future would be the interest on that amount rather than that amount itself; is that correct?
>
> * * *
>
> "The Witness: A debt as of one point in time referred to some other point in time has to be adjusted for interest during that period.
>
> "So an obligation or a liability or a debt or a deficit of $978,000 on one day becomes that with one year's interest a year from then.
>
> "Now, if in the meantime—
>
> "By Mr. Cannon:
>
> "Q. I'm sorry. Say that again.
>
> "A. If I owe you a million dollars today, a year from now I will owe you a million dollars plus interest at some agreed on rate of interest.
>
> "Now, during the period I have paid you the interest, I will still owe you the million dollars.
>
> "Mr. Cannon: Let me withdraw the question." (Elkin deposition, pp. 154-156) *

The actuary made the same point in the Report. The complete discussion which contains the statement relied upon by Kraftco is as follows:

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* Although Mr. Cannon later rephrased the question, he eventually dropped it as "argumentative." (Elkin deposition, p. 157)

"The Defendant has argued that a requirement that a calculated liability for Kraftco be paid in a lump sum would represent a departure from past funding practice. Two points may be noted in this connection.

First, the Kraftco liability is not of the same nature as the unfunded liability remaining for the other participants. The fund's unfunded liability represents the amount by which future contributions added to present assets fall short of meeting future benefits. The policy of paying interest only on that amount is predicated on the fund's receiving in perpetuity the same amount of contributions each year for the same number of employees. Kraftco, on the other hand, has discontinued its contributions and, under the Agreement, is to be assessed a sum of money to recompense the fund for any adverse impact resulting from that discontinuance.

Second, and in any event, the Segal Company determination of Kraftco's liability did not carry with it the presumption that it necessarily be paid in a lump sum. It could, as far as the fund is concerned, be treated as a debt with the fund receiving payments to liquidate it over a period of time." (115a-116a).

Kraftco has referred only to the last paragraph of this discussion. Even that paragraph looks to liquidation of the principal amount of the debt, not merely to interest payments on the principal.

B. Judge Lumbard properly refused to review the calculations of the actuary.

It has been shown in Point IV, *supra*, that the actuary's determination is not reviewable for alleged errors of cal-

culation or for mistakes of fact, and that in the absence of fraud or misconduct, his determination must be accepted as final and binding. Concededly, fraud and misconduct are not involved here (137a, footnote 8 at 245a).

Judge Lumbard properly applied these principles in refusing to review the actuary's determination and found his conclusion to be consistent with the Breyer Agreement and with Judge Tyler's opinion (footnote 5 at 245a). Kraftco has cited no authority to support its contention that the court should make the calculations which the parties left to the actuary for final and binding determination. There is no basis for such review.

CONCLUSION

For the foregoing reasons, Kraftco's appeal should be denied, the plaintiffs' appeal should be granted, and the judgment appealed from should be amended to grant plaintiffs $978,100.00 with interest to be calculated in accordance with footnote 9 to Judge Lumbard's Opinion and Order.

Respectfully submitted,

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August 6, 1974

2 copies of the

Plaintiffs Appellees Appellants Brief

August 1974

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